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Environmental
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State Water Resources Control Board

Division of Water Rights

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OCT 09 2003

Mr. Ward Tabor
Assistant Chief Counsel
Department of Water Resources
1416 Ninth Street
P.O. Box 942836
Sacramento, CA 94236-0001

Dear Mr. Tabor:

COLLABORATIVE PROCESS, OROVILLE HYDROELECTRIC PROJECT, FERC #2100

On September 18, 2003, the State Water Resources Control Board (SWRCB) received, by electronic mail, the most recent draft of the Process Protocols for relicensing the Oroville Division, State Water Facilities FERC Project No. 2100. I am requesting two types of changes in the draft Process Protocols. First, I request that the SWRCB not be listed as a Participant in the Process Protocols. Second, I request that footnote 3 and section 1.3.4, which contain text set forth in quotation marks and attributed to the SWRCB, be deleted. Since the Participants do not agree to that text, these provisions have no place in the Process Protocols, and instead this letter sets forth and clarifies the role of the SWRCB in assisting the collaborative Alternative Licensing Process. This letter also explains why the SWRCB should not be listed as a Participant.

A. Process Protocol

1. Constraints on SWRCB participation

The SWRCB has authority to grant or deny water quality certification as provided under section 401 of the federal Clean Water Act. (Wat. Code, § 13160; 33 U.S.C. § 1341.) SWRCB staff members have actively contributed to the relicensing process for the Oroville Hydroelectric Project. Under the best of circumstances, however, it is difficult for the SWRCB to negotiate or execute settlements in FERC relicensing projects. The SWRCB acts in an adjudicative capacity when it acts on requests for certification under section 401 of the federal Clean Water Act. The SWRCB must be an impartial decision maker, avoiding bias, prejudice or interest in any adjudicative proceedings conducted as part of the SWRCB's regulatory approval. (Cal. Gov. Code, §§ 11425.40, 11430.70.) These requirements prevent the SWRCB from making a prior commitment as to the outcome of its decision-making process. Accordingly, neither an SWRCB staff member participating in the negotiations nor the SWRCB is authorized to bind the SWRCB in advance of the issuance of a certification under section 401.

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The draft Process Protocol lists the SWRCB as a Participant. A Participant is defined in Attachment 2 of the document as "An agency, organization, or other individual who intends to sign a Settlement Agreement as defined in Section 4.1." Section 4.1 describes the roles of several kinds of involved parties, including Interested Parties, Participants, Licensee, Consulting Team, and Facilitator. Interested Parties are agencies, tribes, organizations or individuals that have an interest in the outcome of the relicensing of the Oroville Facilities. Participants are interested parties who have chosen to actively participate in the ALP process, including collaborative development of the record and a Settlement Agreement. Section 4.1.2 contains an exception to the description of the Participants' roles¹ for the SWRCB and for the FERC regarding negotiation and execution of a Settlement Agreement. Section 4.1.2 references Section 1.5 for the Settlement Agreement provisions. Section 1.5, however, provides that the Participants intend to reach a written Settlement Agreement that will accomplish certain listed objectives. Clearly, the primary role of the Participants is to negotiate and sign a Settlement Agreement.

Based on the above references to the role of a Participant, with the exception of the FERC and the SWRCB, a Participant is not simply someone who is actively involved. A Participant is someone who agrees to be bound by the results of the process and who also agrees to the responsibilities in section 4.3 of the document. Although the current draft provides an exception to the role of a Participant for the SWRCB, the exception obviates any reason for the SWRCB to be considered a Participant and contributes to internal inconsistencies in the document. Instead of identifying the SWRCB as a Participant, it appears that the SWRCB is simply an Interested Party in the process.

2. Future SWRCB involvement in the collaborative process

SWRCB staff members intend to attend future technical working group meetings and/or send letters with the objective of providing guidance to DWR and the collaborative group on the type of studies that will be required for a complete Clean Water Act section 401 certification application.² SWRCB staff members will provide information and will call attention to gaps in the information that the SWRCB will need before it considers granting a water quality certification under section 401. SWRCB staff members will make their best efforts to respond to inquiries regarding what the SWRCB would require in any certification it issues under section 401.

¹ Section 4.1.2 states: "Participants are a subset of Interested Parties who have chosen to actively participate in the Plenary and Work groups in the ALP process. Such participation includes collaborative development of the record and a Settlement Agreement. With the exceptions of SWRCB and FERC, each participant intends to negotiate and execute a Settlement Agreement as described in Section 1.5. Each participant intends to support their representative during negotiations."

² The SWRCB's regulations at title 23, California Code of Regulations, section 3855, et seq., specify the required procedures and the contents of applications for 401 certification.

OCT 09 2003

The SWRCB encourages the Participants to sign a settlement agreement or agreements. To the extent that the Participants enter into a voluntary settlement agreement that satisfies the requirements for a water quality certification, and the application for water quality certification contains all of the information required under the SWRCB's regulations, the agreement will facilitate the issuance of a water quality certification. Accordingly, the SWRCB staff will provide input to the Participants in the collaborative process to help guide the Participants toward a settlement that can satisfy the requirements for a water quality certification under the SWRCB's regulations.

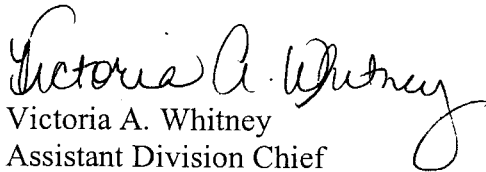
The SWRCB intends to act upon any application or petition for SWRCB approval in connection with the Oroville Hydroelectric Project license pursuant to the SWRCB's regulations. Consistent with the SWRCB's responsibilities as an agency acting in an adjudicative capacity, including the obligation to consider any arguments that may be raised or information provided by parties to the SWRCB proceedings who are not parties to the collaborative process or did not agree to any settlement reached as part of that process, the SWRCB will not negotiate or execute any settlement agreement or make any other commitment that would bind the SWRCB when it acts on the DWR's request for water quality certification or other necessary regulatory approval.

B. California Environmental Quality Act

Issuance of a Clean Water Act section 401 certification by the SWRCB is a discretionary action subject to the provisions of the CEQA. If available, a copy of a draft or final CEQA document should accompany a complete application for Clean Water Act section 401 certification. (Cal. Code Regs., tit. 23, §3856(f)). The SWRCB, which is a responsible agency under CEQA with respect to the Oroville Hydroelectric Project, must be provided with and have ample time to properly review a final copy of a valid CEQA document before taking certification action.

If you have any questions, or want to discuss the details of these comments, please contact Sharon Stohrer, Environmental Scientist, at (916) 341-5397, Barbara Leidigh, Staff Counsel IV, at (916) 341-5190, or me at (916) 341-5423.

Sincerely,



Victoria A. Whitney
Assistant Division Chief
Division of Water Rights

cc: See next page

Mr. Ward Tabor

- 4 -

OCT 09 2003

cc: Ms. Anna West
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